

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-366

PHILIP REINHARD, etc., et al.,

Defendants-Appellants,

vs.

EAGLE BOOKS, INC., etc., et al.,

Plaintiffs-Appellees.

On Appeal From A 3-Judge United States District Court,
Northern District Of Illinois, Western Division

JURISDICTIONAL STATEMENT

WILLIAM J. SCOTT,
Attorney General, State of Illinois.

JAMES B. ZAGEL,
MELBOURNE A. NOEL, JR.,
Assistant Attorneys General,
188 W. Randolph Street, Suite 2200,
Chicago, Illinois 60601,
(312) 793-2570,

Attorneys for Appellants.

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On Appeal From A 3-Judge United States District Court,
Northern District Of Illinois, Western Division

JURISDICTIONAL STATEMENT

Defendants-Appellants appeal from a decision of a 3-judge panel of the United States District Court, Northern District of Illinois, Western Division, declaring Ill. Rev. Stat. (1976), ch. 38, §11-20 (the obscenity statute), to be violative of the Fourteenth Amendment of the Constitution and enjoining the defendants from enforcing §11-20 as presently construed. Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the United States District Court, Northern District of Illinois, Western Division, is as yet unreported and is set forth in the Appendix, *infra*, at page 4a. No motions were made to alter or reconsider the judgment of the district court.

JURISDICTION

Plaintiffs-appellees brought this action under 42 U.S.C. 1983 and 28 U.S.C. 2281. They sought to enjoin enforcement of the Illinois Obscenity Statute, which they alleged to be unconstitutional, and to obtain other relief. The judgment of the United States District Court, Northern District of Illinois, Western Division, favorable to plaintiffs was entered on May 28, 1976. A Notice of Appeal to this Court was filed on July 12, 1976, with the Clerk of the District Court, Northern District of Illinois, Western Division.

The jurisdiction of this Court to review the 3-judge panel's decision by appeal is conferred by 28 U.S.C. 1253, elaborated in 28 U.S.C. 2101(b).

STATUTE INVOLVED

Ill. Rev. Stat. (1976), ch. 38, §11-20, is printed in the Appendix, *infra*, at page 1a.

QUESTIONS PRESENTED

1. Have the Illinois General Assembly and the Supreme Court of Illinois, through its construction of Ill. Rev. Stat. (1976), ch. 38, §11-20(b), given sufficient specificity to the word "obscene" to satisfy this Court's standards for a constitutionally valid obscenity statute [*Miller v. California*, 413 U.S. 15 (1973)]?
2. Did the district court violate principles of comity and federalism when it enjoined the defendants from enforcing ch. 38, §11-20, in bookstores owned by plaintiff Eagle Books, Inc., which had not itself been prosecuted for violating the statute?

STATEMENT OF THE CASE

The present action arose following execution of several search and arrest warrants issued by the Circuit Court in Winnebago County, Illinois, naming materials and employees of the Adult Book and Cinema and the Hollywood Arts Store, both located in Rockford, Illinois, and owned by Eagle Books, Inc. The warrants were issued on February 27, March 1, March 3, and March 5, 1976, at the request of Rockford City Police Officers who had visited the bookstores and signed complaints alleging the sale and display of such magazines as "Fetish" and "Piss Ass" and such films as "Pregnant Lust", "Sucking Sisters" and "Rape of the Waitress." The officers described these materials as containing "sexually explicit depictions." Complaining af-

fidavits revealed that each store had set up several projection booths for showing these and similar films to members of the public willing to deposit coins in the projectors. The arrest warrants were based on Criminal Complaints which had been sworn out against all the individual plaintiffs in the present action, charging them with misdemeanor violations of Ill. Rev. Stat., ch. 38, §11-20. All those charged were salespersons employed by Eagle Books, Inc.⁽¹⁾ (See, generally, Plaintiffs' Group Exhibits 1 and 2.)

During the course of the searches and arrests authorized by warrants, police seized some (but not all) film projectors, business records, monies, a cash register, safe, briefcase, and other items not specifically mentioned in the warrants. While the searches and arrests were occurring, the bookstores could not operate and temporarily ceased business. (See Plaintiffs' Complaint and Supporting Memo's.) On March 4, 1976, Assistant State's Attorney of Winnebago County, David D. Koski, offered to return to plaintiff's counsel all items seized from the bookstores but not named in the search warrants (Defendants' Exhibit AA). Counsel for plaintiffs never reclaimed the additionally seized business property because he decided to do so only if he received a written admission that it had been illegally seized (Tr. of Arg. in Dist. C., pp. 17-18).

After the initial searches and arrests at the Eagle bookstores, Police Capt. Richard Anderson told members of the press that arrests would continue at the bookstores as long as police observed violations of the obscenity law (Defendants' Exhibit DD). Neither he nor any other Rockford po-

lice official ever said that arrests would continue until Eagle Books, Inc. was driven out of business or ever harassed its customers to that end (Defendants' Exhibits A, B, C, D, DD & EE).

Plaintiffs-Appellees have never denied that the magazines and films seized from the Eagle bookstores were obscene (Tr. of Arg., p. 4). It is also uncontested that the bookstores sell some communicative material that is not obscene.

The Complaint initiating the present action was filed in the United States District Court, Northern District of Illinois, Western Division, on March 5, 1976, and summons issued on March 8. After the addition of two more plaintiffs, an amendment to their prayer for relief and the filing of plaintiffs' motion for 3-judge court, defendants, represented by the Rockford City Attorney and the Attorney General, filed Motions To Dismiss Or For Summary Judgment. On April 15, 1976, Judge Joel M. Flaum issued an Opinion finding that the Complaint raised a substantial federal question as to the constitutionality of Ill. Rev. Stat., ch. 38, §11-20, under which plaintiffs were being prosecuted, and that review of the statute by a 3-judge court was warranted. Shortly thereafter, the 3-judge court was appointed and briefs were filed on two questions posed by the court.⁽²⁾ Oral argu-

2 The questions posed were:

- “1. In construing Ill. Rev. Stats., ch. 38, §11-20, has any Illinois court defined the specific conduct at which the statute is directed in accordance with *Miller v. California*, 413 U.S. at 25?
2. If not, is this question to be answered in the first instance by the Illinois Supreme Court, and by what procedure can an answer be obtained?”

¹ No criminal complaint was filed against Eagle Books, Inc.

ment was heard on May 14, 1976; a just-released Opinion of the Illinois Supreme Court construing the obscenity statute (*People v. Ward*, No. 47479) was filed four days later and the decision of the 3-judge court, enjoining any prosecution of Eagle Books, Inc. by the defendants or any enforcement of ch. 38, §11-20, on Eagle Books' premises, was issued on May 28, 1976 (Appendix, p. 4a).

In its Opinion, the Court found that Ill. Rev. Stat., ch. 38, §11-20 was constitutionally invalid as construed because the Illinois Supreme Court had failed to add sufficient specification to the word "obscene", even though it had adopted the standards set forth in *Miller v. California*, 413 U.S. 15 (1973). The three judges also ruled that Eagle Books, Inc. had shown serious irreparable injury in the face of threatened enforcement of the invalid statute which involved searches of its premises, seizures of its materials and arrests of its employees. Regarding the individual plaintiffs, the court found no justification for enjoining their prosecutions and it dismissed their portion of the Complaint without prejudice.

THE QUESTIONS ARE SUBSTANTIAL

The present appeal raises at least two issues of general importance which this Court has not yet been required to resolve, issues emanating from the rule in *Miller v. California*, 413 U.S. 15, 25 (1973) requiring states to either amend or construe their obscenity statutes to conform with standards announced in *Miller*. Simply put, those issues are: (1) can a state obscenity statute drawn to the *Roth-Memoirs* standard still be valid under the *Miller* standard, when the statute is viewed in light of its application to specific cases by the state's high court; and (2) what language must a state high court opinion include when it seeks to construe an obscenity statute to incorporate the *Miller* requirements?

After deciding several post-*Miller* cases and using the *Miller* Opinion extensively, the Supreme Court of Illinois finds itself in total disagreement with a 3-judge panel of the United States District Court for the Northern District of Illinois concerning the above issues and the validity of the Illinois obscenity law. As a result, Illinois prosecutors who are sworn to enforce the law find themselves encouraged to do so by the highest state court but warned, and in this case enjoined, by the federal court to cease obscenity prosecutions because the statute is unconstitutional. This situation inhibits state's attorneys from performing one of their constitutionally mandated tasks and it leaves police officials vulnerable to damage suits for performing their jobs.

It is thus crucial to strong law enforcement in Illinois that the issues presented by this appeal be heard and decided in plenary fashion. The factual background from which this case arose is exactly the type of situation Congress had in mind when it set up 3-judge district panels and gave this Court direct appeal jurisdiction to resolve damaging state-federal court conflicts. 28 U.S.C. 2281 and 1253.

A.

The Illinois Obscenity Statute, As Written And As Applied To Obtain Convictions In Specific Published Cases, Is Clear Enough To Satisfy The Requirements Of *Miller v. California*.

The history of obscenity law in Illinois shows a consistent desire on the part of the State, both legislatively and judicially, to adopt whatever rule is approved by this Court. The present statute was written on the basis of this Court's decisions in *Roth v. United States*, 354 U.S. 476 (1957), and *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), as can be demonstrated by a comparison of operative language in both the statute and the Opinions. Consequently, Illinois now has a statute that is stricter in one respect from the prosecutor's point of view than the new federal standard of *Miller*—the statute contains the utterly-without-redeeming-social-value test.

This obscenity statute, Ill. Rev. Stat., ch. 38, §11-20, has been applied both before and since *Miller v. California, supra*, only to materials which contain obscenity as defined by this Court in *Miller*: depiction or description of sexual conduct in a patently offensive way. 413 U.S. at 25. In *People v. Ridens I*, 51 Ill. 2d 410, 282 N.E.2d 691 (1972), the pictures found obscene portrayed nude males and females

engaged in seductive embraces, posed with their legs spread so as to focus attention on their genitals. In many instances, the models had their hands or mouths close to another's genitals, suggestive of abnormal sexual conduct. The magazines in *People v. Gould*, 60 Ill. 2d 159, 324 N.E.2d 412 (1975), depicted offensive sexual conduct, including lewd exhibitions of the genitals. Publications used as the basis for prosecution in *People v. Ward*, 63 Ill. 2d 437 (1976), depicted sexual conduct in a patently offensive way. In the present case, the films seized portrayed actors masturbating, performing group sex acts and engaging in many sado-masochistic sex-related acts (Plaintiffs' Group Exhibit 1).

There can be no question that these magazines, pictures and films seized under ch. 38, §11-20 are obscene within the *Miller* definition. All of them are found among the examples of obscenity mentioned by this Court in 413 U.S. at p. 26.

The Illinois General Assembly, when it speaks in ch. 38, §11-20(b) of "appeal to prurient interest" and "a shameful or morbid interest in nudity, sex or excretion," uses many of the same words used in the Court's *Miller* specificity rule. In total, the Illinois statute does not depart much from the *Miller* model. As the Supreme Court of Illinois held recently in *Ward, supra*, the Illinois statutory definition of obscenity is sufficiently clear (especially when viewed in light of what materials the courts have found obscene in their published opinions) to withstand constitutional objections. 63 Ill. 2d at p. 441. See also *Young v. American Mini Theaters, Inc.*, U.S., 19 Crim. L. Rptr. 3145 (section on ordinance vagueness) (1976).

B.

Additionally, The Supreme Court Of Illinois Did Construe The Obscenity Statute So As To Properly Incorporate Into It This Court's *Miller* Standard, Including The Specific Examples Of Obscenity.

The court below correctly noted that the major change in obscenity law decreed by *Miller v. California*, 413 U.S. 15 (1973), was its requirement that obscenity statutes be revised or construed to more specifically define the sexual portrayals prohibited therein. The *Miller* Opinion stressed several times that the needed specificity could be added to obscenity statutes through judicial construction by state courts of last resort. 413 U.S. at pp. 25, 26, 28 and Note 6. Judicial construction of obscenity statutes to bring them into line with *Miller* was accomplished or approved by this Court in *Hamling v. U.S.*, 418 U.S. 87 (1974), and *Miller v. California* II, 418 U.S. 915 (the second appeal of the *Miller* case, after the California courts had construed and upheld their statute following this Court's remand in *Miller* I).

Accordingly, the Illinois Supreme Court has three times construed Section 11-20 of the Criminal Code of 1961, as amended.

In *People v. Ridens* II, 59 Ill. 2d 362, 321 N.E.2d 264 (1974) the Court sought to read the *Miller* formulae into the statute. See *People v. Watson*, 26 Ill. App. 3d 1081, 325 N.E.2d 629, 631 (1975) ("In Ridens . . . the . . . Court . . . stated that the Illinois statute substantially incorporates or is, at least, consistent with the requirements established in *Miller*"). In their lengthy *Ridens* II Opinion, the Illinois Supreme Court quoted the operative passages of *Miller*, pp. 24-26 in their entirety including the examples of ob-

scenity, and then said: "It suffices to, and we now construe §11-20 of the Criminal Code and the Moline obscenity ordinance to incorporate parts (a) and (b) of the *Miller* standards." 59 Ill. 2d at 371.

The difficulty with *Ridens* II is that the holding of the opinion fails to specifically refer back to and give specific incorporation to that part of *Miller* which states:

"It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, *supra*:

- (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
- (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."

Mr. Justice Davis, writing in dissent, noted this omission.

However, when the defendants in *Ridens* II again petitioned this Court for Certiorari alleging Illinois' noncompliance with *Miller*, their petition was denied even though four members of this Court voted to grant Certiorari and reverse the decision of the Illinois Supreme Court. 421 U.S. 993 (May 27, 1975). When added to the Illinois Supreme Court's expressed intention of incorporating the *Miller* standards in *Ridens* II, this unusual denial of certiorari seemed to indicate that the construction of ch. 38, §11-20 by the Illinois Court was complete and satisfied *Miller*.

Whatever doubt may have existed regarding the incorporation of *Miller* by Illinois was resolved ten months after *Ridens* II. In *People v. Gould*, 60 Ill. 2d 159, 324 N.E.2d 412 (1975) the Court analyzed its position *vis-a-vis Miller*:

"In *Miller v. California*, the Supreme Court in describing the constitutional guidelines for the regulation of obscene material said . . . :

"* * * State statutes designed to regulate obscene materials must be carefully limited. As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. * * *

We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, *supra*:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."

At the direction of the Supreme Court of the United States, in *People v. Ridens*, 59 Ill.2d 362, 321 N.E.2d 264 (hereafter Ridens II), we consider further, in light of *Miller*, our earlier judgment in *People v. Ridens*, 51 Ill.2d 410, 282 N.E.2d 691 (Ridens I). We held in Ridens II that our obscenity statute (Ill. Rev. Stat. 1969, ch. 38, par. 11-20) remained constitutional, we construed our statute to incorporate parts of guidelines (a) and (b) of the *Miller* standards (*which are set out in the above quotation from Miller*) and stated that under our statute the third question or guideline which must be considered in determining whether the matter or work is obscene is whether it is 'utterly without redeeming social value.' We explained that the more restrictive guideline (c), or part (c), of the *Miller* standard, *i.e.*, whether 'the work, taken as a whole, lacks serious literary, artistic, political, or scientific value' cannot be used. See Ridens II."

People v. Gould, 324 N.E.2d at 414-15, (emphasis added) (citations omitted).

The Illinois Supreme Court's reprinting of all the operative *Miller* passages and reincorporation of the guidelines "which are set out in the above quotation" clearly demonstrate that this Court's specific examples of obscenity were read into the Illinois obscenity statute in *Ridens* II and *Gould*. Thus, the court below erred when it interpreted the *Ridens* II and *Gould* opinions, *supra*, as not adopting the *Miller* examples of obscenity as their own, in order to meet *Miller's* specificity requirement.

The same general technique employed by the Supreme Court of Illinois to incorporate the *Miller* examples of prohibited obscenity into ch. 38, §11-20 was used by this Court to save a federal obscenity statute in *Hamling v. U.S.*, 418 U.S. 87 (1974). The *Hamling* decision did not in

so many words repeat and adopt *Miller's* list of obscene types of materials. It simply stated:

"As noted above, we indicated in *U.S. v. 12 200-ft. Reels of Film*, *supra*, 413 U.S. at 130 n.7, 93 S.Ct. at 2670, that we were prepared to construe the generic terms in 18 U.S.C. 1462 to be limited to the sort of 'patently offensive representations or descriptions of that specific "hard core" sexual conduct given as examples in *Miller v. California*.' We now so construe the companion provision in 18 U.S.C. 1461, the substantive statute under which this prosecution was brought. As so construed, we do not believe that petitioner's attack on the statute as unconstitutionally vague can be sustained." 418 U.S. at 115.

This is essentially what the Illinois Supreme Court said in *Ridens II* and *Gould, supra*, when it reprinted the governing portions of *Miller*, including the examples, and then construed ch. 38, §11-20 to include those requirements. Therefore, the method of incorporation used by the Illinois Court was effective and proper, and it precludes a successful attack on the statute's constitutionality.

C.

The District Court Violated Important Principles Of Community And Federalism When It Enjoined Defendants From Enforcing The Illinois Obscenity Statute On The Premises Of Eagle Books, Inc.

This Court in several decisions beginning with *Younger v. Harris*, 401 U.S. 37 (1971), has held that federal courts may not enjoin pending or contemplated state court criminal prosecutions or criminal-related proceedings or the performance of judicial duties by state officers in criminal proceedings, unless exceptional circumstances of bad faith and irreparable injury are shown to exist. The lower

court in the present case, while not finding that the record justified an injunction against Illinois' pending prosecutions of the individual plaintiffs, did issue an injunction protecting the uncharged corporate plaintiff, Eagle Books, Inc., from prosecution or enforcement under Ill. Rev. Stat., ch. 38, §11-20.

Defendants-Appellants submit that the District Court in issuing its injunction acted contrary to the *Younger* rule as explained in *Hicks v. Miranda*, 420 U.S. 920, 95 S.Ct. 2281 (1975). Although admitting that Eagle Books had "some vicarious involvement with the pending prosecutions" of its employees and that the policies of *Younger* must be considered, the District Court never found that plaintiff made out a case for itself under the narrow exception to *Younger*. Instead, the court invoked a "presumption" of irreparable damage stemming from the unconstitutionality of ch. 38, §11-20 and concluded that the prospect of continued enforcement of the obscenity law seriously interferes with the distribution of communicative materials by Eagle Books. However, no evidence of record was cited by the lower court to substantiate either the presumption or the fact of irreparable harm to Eagle Books from future enforcement of the statute.

This Court in *Younger v. Harris*, 401 U.S. 37, 91 held that the possible unconstitutionality of a state statute on its face does not in itself justify injunctive relief against its enforcement by state officials. In numerous cases the Court has stressed that even irreparable injury is not sufficient to support federal intervention unless the injury is both "great and immediate." *Fenner v. Boykin*, 271 U.S. 240, 46 S.Ct. 492 (1926). Where the injury to the criminal defendant is merely that incidental to every criminal pro-

ceeding brought in good faith, the federal court should not interfere in a state criminal prosecution. *Younger v. Harris*, 401 U.S. 37 at 49. The defendant in a criminal case who fails to make a showing of bad faith or harassment, then cannot rely on federal court intervention to enjoin his prosecution in state court even where the applicable statute may be unconstitutional *on its face*. *Younger v. Harris*, 401 U.S. at 54.

More to the point in the present fact situation is the closely analogous case of *Hicks v. Miranda*, *supra*, and its holdings. There, several copies of a film, "Deep Throat," had been seized from a theater by officers pursuant to warrant, and criminal misdemeanor charges were filed against some theater employees. Shortly thereafter, appellee Miranda, who was not then a defendant in any criminal prosecution, filed a suit in the United States District Court praying for an injunction against enforcement of the California obscenity statute and for the return of the films. Some weeks following the filing of the federal suit and the convening of a 3-judge court, Miranda and his business entities were added as defendants in the state prosecution. The 3-judge court declared the state statute to be unconstitutional and ordered the return of the films.

This Court reversed the district panel's judgment saying that the complaint should have been dismissed for the reason, *inter alia*, that federal consideration of the case on its merits was a violation of *Younger v. Harris*. This Court noted that even though they were not criminally charged when the suit was filed:

"Appellees had a substantial stake in the state proceedings, so much so that they sought federal relief, demanding that the state statute be declared void and

their films be returned to them. Obviously, their interest and those of their employees were intertwined; and as we have pointed out, the federal action sought to interfere with the pending state prosecution. Absent clear showing that appellees, whose lawyers also represented their employees, could not seek the return of their property in the state proceedings and see to it that their federal claims were presented there, the requirements of *Younger v. Harris* could not be avoided on the ground that no criminal prosecution was pending against appellees on the date the federal complaint was filed. The rule in *Younger v. Harris* is designed to 'permit state courts to try state cases free from interference by federal courts,' *id.*, 403 U.S., at 43, 91 S. Ct., at 750, particularly where the party to the federal case may fully litigate his claim before the state court." 95 S.Ct. at pp. 2291-92.

The Court also found the lower court's conclusion, that extraordinary circumstances of bad faith and harassment had been shown, unsupported by the record. It seemed to the Court that the lower court's judgment had been predicated almost entirely on its conclusion that the obscenity statute was unconstitutional. However, even if this conclusion was correct, the conflict with California courts on the subject did not justify an injunction under *Younger*.

According to the holding of *Hicks v. Miranda*, the district court in the present case should not have issued its injunction to protect a corporation 1) whose employees were criminally charged in the state court, 2) whose evidentiary property it sought to have returned, 3) whose prayer was to have ch. 38, §11-20 declared unconstitutional, and 4) whose exhibits did not prove up an exception to the *Younger* doctrine.

CONCLUSION

For the reasons set forth above, jurisdiction should be noted.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General, State of Illinois,

JAMES B. ZAGEL,
MELBOURNE A. NOEL, JR.,
Assistant Attorneys General,
188 W. Randolph Street, Suite 2200,
Chicago, Illinois 60601,
(312) 793-2570.

Attorneys for Appellants.

September 9, 1976

APPENDIX

STATUTE INVOLVED

Ill. Rev. Stat. (1976), ch. 38, §11-20.

11-20. § 11-20. *Obscenity.*) (a) Elements of the Offense.

A person commits obscenity when, with knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, he:

- (1) Sells, delivers or provides, or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene; or
- (2) Presents or directs an obscene play, dance or other performance or participates directly in that portion thereof which makes it obscene; or
- (3) Publishes, exhibits or otherwise makes available anything obscene; or
- (4) Performs an obscene act or otherwise presents an obscene exhibition of his body for gain; or
- (5) Creates, buys, procures or possesses obscene matter or material with intent to disseminate it in violation of this Section, or of the penal laws or regulations of any other jurisdiction; or
- (6) Advertises or otherwise promotes the sale of material represented or held out by him to be obscene, whether or not it is obscene.

(b) Obscene Defined.

A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. A thing is obscene even though the obscenity is latent, as in the case of undeveloped photographs.

(c) Interpretation of Evidence.

Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other specially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience.

Where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that material is being commercially exploited for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

In any prosecution for an offense under this Section evidence shall be admissible to show:

- (1) The character of the audience for which the material was designed or to which it was directed;
- (2) What the predominant appeal of the material would be for ordinary adults or a special audience, and what effect if any, it would probably have on the behavior of such people;
- (3) The artistic, literary, scientific, educational or other merits of the material, or absence thereof;
- (4) The degree, if any, of public acceptance of the material in this State;
- (5) Appeal to prurient interest, or absence thereof, in advertising or other promotion of the material;

- (6) Purpose of the author, creator, publisher or disseminator.

(d) Sentence.

Obscenity is a Class A misdemeanor. A second or subsequent offense is a Class 4 felony.

(e) Prima Facie Evidence.

The creation, purchase, procurement or possession of a mold, engraved plate or other embodiment of obscenity specially adapted for reproducing multiple copies, or the possession or more than 3 copies of obscene material shall be prima facie evidence of an intent to disseminate.

(f) Affirmative Defenses.

It shall be an affirmative defense to obscenity that the dissemination:

- (1) Was not for gain and was made to personal associates other than children under 18 years of age;
- (2) Was to institutions or individuals having scientific or other special justification for possession of such material.

Amended by P.A. 77-2638, § 1, eff. Jan. 1, 1973.

OPINION
 IN THE
 UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF ILLINOIS
 WESTERN DIVISION

EAGLE BOOKS, INC., a Delaware corporation, GEORGE ROBERT HOBBS, JAMES E. TALKINGTON, JACQUELINE D. DAVIS, SHAWNEE ELMORE, ROBERT GOSNEY, MICHAEL MILAZZO, IRA JERRY FERRELL and DAVID J. FOSS,

Plaintiffs,

vs.

PHILIP REINHARD, Individually and in his capacity as State's Attorney of Winnebago County, Illinois, and DELBERT PETERSON, Individually and in his capacity as Chief of Police of the City of Rockford, Illinois,

Defendants.

No. 76 C 20014

Before CUMMINGS, Circuit Judge, and WILL and FLAUM, District Judges.

MEMORANDUM OPINION

FLAUM, District Judge. Plaintiffs are employees of bookstores and the corporate owner of those bookstores. They bring this suit to declare 38 Ill. Rev. Stats. §11-20 unconstitutional, and to enjoin defendant Philip Reinhard, State's Attorney of Winnebago County, Illinois and defendant Delbert Peterson, Chief of Police of the City of Rockford, Illinois, from enforcing the statute. Retrospective relief

for prior activities carried out in connection with enforcement is also sought. Because of the injunctive nature of the relief requested against a state statute, a three-judge court was requested under 28 U.S.C. §2281. The substantiality of the federal question presented was discussed in a memorandum opinion issued by the single judge, issued April 15, 1976, which concluded with the convening of the present three judge court. In addition to the verified complaint, and the attached exhibits, representations of fact have been made through plaintiffs' Voluntary Bill of Particulars, motions and accompanying exhibits by both defendants for dismissal or summary judgment, and during oral argument held on May 14, 1976 before the three judge court. These sources are sufficient to dispose of this case. For the reasons which follow, prospective injunctive and declaratory relief will be granted with respect to the corporate defendant, and the suit will be dismissed with regard to the individual defendants without prejudice.

FACTS

Plaintiff Eagle Books, Inc. ("Eagle Books") owns two bookstores in the City of Rockford, "The Adult Book and Cinema", and the "Hollywood Art Store". Individual plaintiffs were employed as salespersons in these stores. In a series of searches at least in part authorized by search warrants signed by state judges, Rockford police appeared at the Eagle Book stores on February 27, March 1, and March 3, 1976. They seized the films named in the warrants, as well as the film projectors that carried them, monies, business records, a cash register, safe, brief case, and other items. Another search was made on March 11. The warrants were limited to films, and were based on complaints signed by police officers characterizing the con-

duct portrayed in the movies and giving the opinion of the officers that the movies were obscene. In the course of these searches, the individual plaintiffs were arrested under 38 Ill. Rev. Stats. §11-20 for the selling of "obscene" materials. On March 5, two more employees of the bookstores were arrested on the same ground. They were subsequently added as plaintiffs in this lawsuit. In the course of the searches, seizures and arrests, the bookstores cannot operate, and temporarily cease business. It is uncontested that the bookstores sell, in addition to items which were seized as obscene, communicative material which is not obscene. (See defendant Peterson's Motion To Dismiss Or In The Alternative For Summary Judgment, at p. 6; Transcript of Oral Argument at p. 37.)

Subsequent to the seizures of items from the bookstores, attempts were made by plaintiffs' attorneys to retrieve those items which were not specified in the warrant. For reasons not entirely clear to this court, plaintiffs' attorney felt obligated to refuse return of at least some of the items unless the State's Attorney would stipulate that those items had been seized in violation of the law. Such a stipulation was never offered, and the items have all, consequently, been retained. (See Tr. of Oral Argument at pp. 17-19.)

An important ingredient of plaintiffs' allegations is the prospect that the procedure for obtaining warrants to seize "obscene" movies is unconstitutional in that it gives rise to confiscation of communicative materials without adequate provision for a hearing or for supervision by a magistrate or other judicial officer. However, alternative search procedures have since been exclusively utilized by the defendants as part of an agreement which obviated

the need for a ruling by this court on plaintiffs' motion for a temporary restraining order. Defendants have not, however, conceded that their original procedure is unconstitutional.

JUSTICIABILITY

Law enforcement officers intended to prosecute violations of Section 11-20. (See exhibit DD of "Exhibits For Defendant Reinhard's Motion To Dismiss Or For Summary Judgment"; Defendant Peterson's Motion To Dismiss, Or, In the Alternative For Summary Judgment at p. 6.) Taken together with the number and nature of searches carried out on Eagle Books' premises prior to the filing of the complaint, this circumstance leads the court to find that the prospect of future enforcement of Section 11-20 in such a fashion as will disrupt the operations or deprive of materials the Adult Book and Cinema and the Hollywood Art Store is sufficiently immediate to give rise to a case or controversy under Article III of the Constitution. *Steffel v. Thompson*, 415 U.S. 452, 460 (1974).

Constitutionality of Section 11-20

The plaintiffs' challenge to the constitutionality of Section 11-20 revolves around the requirements set forth in *Miller v. California*, 413 U.S. 15 (1973). The circumstances under which *Miller* arose and the logical consequences of its holding and judgment merit examination to determine what it mandates state courts to do.

The *Miller* standards fall in two categories, a tripartite definition, and a requirement of specificity. The first category was described as follows:

"The basic guidelines for the trier of fact must be (a) whether 'the average person, applying contemporary

standards' would find that the work taken as a whole appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, *sexual conduct specifically defined by the applicable state law*; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value." *Id.* at pp. 24-25 (citations omitted, emphasis added).

The second category is an elaboration of the specificity requirement alluded to in (b), above. *Miller* did not, however, set standards with its explanation of specificity; it merely gave examples of what would be sufficiently specific:

"We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, *supra*:

"(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

"(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Id.* at 25.

It can be seen from these examples that mere "sexual conduct" is not specific enough to give adequate notice of what is being regulated as obscene, but with the addition of "the ultimate sexual act", it would be. Similarly, it can be seen that through the use of such examples, "excretory functions" can be incorporated into the "sexual conduct" of the (b) for the tripartite standard.

The tripartite standard of *Miller* was an embellishment on a tripartite standard then in use, originally promulgated in *Roth v. United States*, 354 U.S. 476 (1957), and

Memoirs v. Massachusetts, 383 U.S. 413 (1966). The so-called *Roth-Memoirs* standard was that material could be regulated as obscene if:

" . . . (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it confronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." *Memoirs v. Massachusetts, supra*, at p. 418, cited in *Miller v. California, supra*, at p. 21.

A comparison of the two tripartite standards must take into account the facts confronting the *Miller* Court. A defendant had been convicted for knowingly distributing obscene matter, under the California Penal Code, §311.2(a). The jury had been "instructed that, in determining whether the 'dominant theme of the material, taken as a whole . . . appeals to the prurient interest' and in determining whether the material 'goes beyond the customary limits of candor and affronts contemporary community standards of decency' it was to apply 'contemporary community standards of the State of California' instead of the national community standards." *Miller v. California*, 423 U.S. at p. 31. The court found these deviations from the prevailing view that a national standard should have been used did not give rise to a constitutional error. Thus, as far as the defendant was concerned, no complaint could be had as to the shift between the (a) and (b) of the respective standards, except for the specificity requirement alluded to in part (b) of the *Miller* tripartite standard. Conviction under part (c) of the *Memoirs* standard similarly could have no prejudice to one arguing for part (c) of *Miller*, for material utterly without redeeming social value, as that term

had been defined, would *a fortiori* lack serious artistic, literary, political, or scientific value. It thus appears from this comparison that the greatest difference in obscenity law, so far as the defendant in *Miller* was concerned, was the specificity requirement, a requirement never formalized in *Miller*, but only exemplified. This appears to be the sole, if not the most important explanation for the judgment of *Miller*, which was to remand the case back to the California state appellate court.

Further importance of the specificity requirement, in terms of the remand, appears from the nature of the material which the defendant was convicted of distributing.

"While the brochures contain some descriptive printed material, primarily they consist of pictures and drawings very explicitly depicting men and women in groups of two or more engaging in a variety of sexual activities, with genitals often prominently displayed." *Id.* at p. 19.

This material is more than coincidentally covered by the suggested specifying examples of *Miller*. If the specificity requirement were surplusage, no remand should have been necessary at all.

Cases after *Miller v. California* reasserted the importance of the specificity requirement, and even read in the *Miller* examples to constitutionally construe a federal statute. *Hamling v. United States*, 418 U.S. 87 (1974). Similarly, the Court reserved for state court construction the specificity of statutes comparable to Section 11-20 in *Miller* itself, and in the companion case of *Paris v. Adult Theatres I v. Slayton*, 413 U.S. 49 (1973). The relation of the specificity requirement to First Amendment protections was underscored again in *Jenkins v. Georgia*, 418 U.S. 153

(1974), in which Mr. Justice Rehnquist, speaking for a majority of the Court, held that the film *Carnal Knowledge* could not, constitutionally, be treated as obscene:

"We . . . took pains in *Miller* to 'give a few plain examples of what a state could define for regulation under part (b) of the standard announced,' that is the requirement of patent offensiveness . . . While this did not purport to be an exhaustive catalogue of what juries might find patently offensive, it was certainly intended to fix substantive constitutional limitations, deriving from the First Amendment, on the type of material subject to such a determination. It would be wholly at odds with this aspect of *Miller* to uphold an obscenity conviction based on a defendant's depiction of a woman with a bare midriff, even though a properly charged jury unanimously agreed on a verdict of guilty." (*Id.* at pp. 160-1.) (Citations omitted). (Emphasis added).

In the context of the importance in *Miller* attached to specificity, the recent litigation concerning Section 11-20 must be reviewed. Section 11-20, in pertinent part, reads

"(b) Obscene Defined.

A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in the description or representation of such matters. A thing is obscene even though the obscenity is latent, as in the case of undeveloped photographs." 38 Ill. Rev. Stats. §11-20.

No further definition of obscenity is contained in the statute or incorporated by reference. Prior to *Miller*, the Illinois Supreme Court found this definition to be constitutional, in an opinion authored by Justice Davis. *People v. Ridens*, 51 Ill. 2d 410, 282 N.E. 2d 691 (1972) (hereafter

referred to as "*Ridens I*"). Subsequently, the United States Supreme Court granted certiorari, vacated the judgment, and remanded the cause for consideration in light of *Miller*. On remand, *People v. Ridens*, 59 Ill. 2d 362, 321 N.E. 2d 264 (1974) ("*Ridens II*"), the Illinois Supreme Court said:

"We need not and do not attempt to analyze the changes from the three part Roth-Memoirs standard effected by the enunciation of the three part *Miller* standard. It suffices to, and we now construe section 11-20 of the Criminal Code to incorporate parts (a) and (b) of the *Miller* standard." 321 N.E. 2d 270.

The context of the quotation clearly indicates that the (a) and (b) referred to are of the tripartite scheme, rather than the two examples, a shortcoming which was pointed out by Justice Davis, who was now the lone dissenter. 321 N.E. 2d 276.¹

An incorporation of the *Miller* tripartite standard cannot alone satisfy *Miller's* specificity requirement. *Miller* explicitly reserved for the states the specification itself. Not every state will seek to regulate all, or even the same subset of that material which can be constitutionally treated as obscene. Indeed, the Supreme Court of the United States expressly avoided demanding the use of its particular examples as a standard or proposed regulatory scheme. *Ridens II* might have explicitly included the *Miller* examples as its own, by construction, as did the Supreme Court in *Ham-*

¹ Where the state court has supplied examples by construction, the specificity problem may be cured. See, *Miller v. California*, 418 U.S. 915 (1974) (appeal dismissed for want of substantial federal question); accord, *People v. Nissinoff*, 43 Cal. App. 3d 1025, 118 Cal. Reptr. 457 (1975); *People v. Enskat*, 33 Cal. App. 3d 900, 908-10, 109 Cal. Reptr. 433, 438-39 (1973), cert. denied, 418 U.S. 937 (1974).

ling, but *Ridens II* did not. It remained after *Ridens II* for Section 11-20 to be amended either legislatively or by state judicial construction to supply the wanting specificity so that the nature of the possible obscene materials being regulated, and their distinction from protected materials, could be adequately defined. *That definition is as essential to law enforcement officials who are charged with carrying out the law, as it is to juries like the one in Jenkins v. Georgia*, who must apply the law to a set of facts.

On the three other occasions in which the Illinois Supreme Court had to construe Section 11-20, it chose not to supply the needed specificity. In *People v. Gould*, 60 Ill. 2d 159, 324 N.E. 2d 412 (1975), the tripartite *Miller* standard, and the two possible examples were quoted, just as they were in *Ridens II*. Reference was made to *Ridens II* for the incorporation of the *Miller* tripartite standard, and Justice Davis, dissenting, incorporated by reference his prior dissent in *Ridens II*. In *People v. Hume*, 60 Ill. 2d 397, 327 N.E. 2d 329 (1975), specificity was not explicitly dealt with. Finally, in an unanimous² opinion filed the very day that oral argument was heard in this case, the Illinois Supreme Court clearly stated that no further specifying judicial construction of Section 11-20 is forthcoming:

"The defendant now argues that the statute [§11-20] does not sufficiently define the type of conduct whose depiction is proscribed.

"In *People v. Ridens*, 51 Ill. 2d 410 [*Ridens I*], we affirmed the convictions of defendants who had been found guilty of violating, *inter alia*, the Illinois obscenity statute by selling obscene publications. The United States Supreme Court subsequently remanded

² The late Justice Davis had previously ceased to sit on the Illinois Supreme Court

that case and directed us to reconsider our decision in light of the principles announced in *Miller* and related decisions. (*Ridens v. Illinois*, 413 U.S. 912, 37 L.Ed. 2d 1030, 93 S.Ct. 1046.) This court again affirmed the convictions and found that the Illinois obscenity statute was constitutional. (*People v. Ridens*, 59 Ill. 2d 362 [Ridens II], cert. denied, 421 U.S. 993, 44 L.Ed. 2d 483, 95 S.Ct. 2000 (hereinafter referred to as Ridens II).) It was held in Ridens II that the obscenity statute was sufficiently clear and that it adequately informed the public of the conduct whose depiction is proscribed. We noted that the statutory definition of obscenity statutes includes within the scope of the 'prurient interest' a 'shameful or morbid interest in nudity, sex, or excretion.' The defendant argues that we erred in Ridens II in our interpretation of *Miller* and that *Miller* requires obscenity statutes to be much more specific in defining the type of material which will be considered obscene. We see no reason to reconsider our decision in Ridens II. It is extremely difficult to define the term 'obscenity' with a fine degree of precision. *We again express our opinion that Illinois statutory definition is sufficiently clear to withstand constitutional objections.*" *People v. Ward*, No. 47479, slip op. at p. 2 (Ill. Sup.Ct., filed May 14, 1976). (Emphasis added) (Explanation supplied).

The similarity between Section 11-20, and the California statute which was the subject of the *Miller* remand is inescapable:

"(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes beyond the customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance." *Miller v. California*, 413 U.S. 15, 17, 18, n.1 (1973).

This court does not believe *Miller* can be properly construed as allowing the actual language of Section 11-20 to be specific without the judicial engraving of *Miller*-type examples, or other specifications such as those articulated in Justice Davis's dissent in *Ridens II*. As no such specification has been supplied by the Illinois Supreme Court, this court holds that Section 11-20, as construed, is constitutionally invalid.

Is Equitable Relief Appropriate On Behalf Of The Individual Plaintiffs?

Defendants contend that under *Younger v. Harris*, 401 U.S. 37 (1971), the equitable relief requested by plaintiffs is barred by considerations of comity. As to all the individual plaintiffs, there is currently a pending criminal proceeding in the Illinois state courts. Federal interference with those proceedings can be justified only if it can be shown that the proceedings are the product of bad faith on the part of law enforcement officials, or that other extraordinary circumstances exist.

The gravamen of bad faith prosecutions is the lack of a reasonable expectation that valid convictions will result. Section 11-20 has been repeatedly upheld by the Illinois Supreme Court. Good faith enforcement of such a statute cannot give rise to a bad faith prosecution. The complaint, as elucidated and limited by the Voluntary Bill of Particulars (see section I, "Facts Upon Which The Assertion Of Official Bad Faith And Harassment Are Based") relies on: (1) the procedure to obtain warrants which authorize seizure of movies; (2) the seizure of items beyond the scope of a search warrant; (3) delay in filing charges based on material seized until after the commencement of the present lawsuit; (4) refusal to stipulate that items seized

beyond the scope of the search warrants were illegally seized; (5) the use of allegedly illegally seized items for investigative purposes; (6) the filing of felony charges and request for felony bail bond for arrests under Section 11-20, whose violation is a misdemeanor; (7) failure to take into custody some persons who were arrested in the course of searches; and (8) statements made by defendants and their agents.

The relation of these assertions to bad faith harassment is attenuated since the adoption of alternative procedures by defendants appears to have avoided any recurrence. The statements attributed to defendants, or their alleged agents, are entirely consistent with good faith prosecution, albeit somewhat vigorous. Prosecutors have discretion to enforce state laws to the limit of their resources. No bad motive is attributable to the decision to enforce Section 11-20. Seizures beyond the scope of the warrant are generally unconstitutional, and defendants have not contended (with the exception of film projectors) that any justification exists for those seizures. Only the corporate defendant has rights with respect to these seizures, however. The initial filing of felony charges and the request for felony bail bond on a Section 11-20 misdemeanor charge is the most promising candidate to support an ultimate finding of bad faith. It is, however, an isolated occurrence. The improprieties allegedly committed, with this one exception, are either wholly consistent with good faith prosecution, or else readily redressible in the proceedings which are now pending, insofar as the individual plaintiffs are concerned. These items may nonetheless have probative value toward establishing bad faith if future events supplement them. While the court does not implicitly condone all of the practices

alleged to have been carried out by defendants and their agents, we hold that the complaint, including the bill of particulars, does not make out a claim for the bad faith harassment exception as to the individual plaintiffs and that consequently, the complaint must be dismissed as to the individual plaintiffs for failure to state a claim on which relief can be granted.

The Propriety Of Equitable Relief For Eagle Books

Having found that 38 Ill. Rev. Stats. §11-20 is unconstitutional as construed, for failure to incorporate specific examples of obscenity, or to otherwise satisfy the specificity requirements of *Miller v. California, supra*, it remains for the court to consider what, if any, relief should be fashioned for Eagle Books, in light of this court's holding that no equitable relief is appropriate as to the individual plaintiffs. The comity considerations of *Younger v. Harris, supra*, however, ordinarily apply only when there is a pending criminal proceeding against the very plaintiff who seeks relief in federal court. Otherwise, declaratory and injunctive relief may be given on traditional grounds. *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *Steffel v. Thompson*, 415 U.S. 452 (1974). In this particular case, the court must engage in an analysis similar to one suited for determination of the existence of bad faith/extraordinary circumstances, in order to determine whether the corporate plaintiff, Eagle Books, should be treated for purposes of fashioning relief as though there in fact were a pending criminal proceeding against it.

Doran v. Salem Inc., supra, acknowledged the question of separating, for purposes of fashioning relief, plaintiffs in one lawsuit according to whether or not each had a pending criminal proceeding. Three corporations in a

single town each operated bars. At those bars, they employed women with uncovered breasts. The town enacted an ordinance which made such employment a sufficient condition for the imposition of criminal punishment against the corporations in the form of a fine. On the effective date of the ordinance, the corporations ceased the practice, but jointly filed a complaint in federal district court to have the ordinance declared unconstitutional and to have its enforcement enjoined. The complaint requested a temporary restraining order which was denied. Subsequent to the denial, one of the three corporations temporarily resumed the practice, and became the subject of a criminal prosecution in the state court. In holding that each plaintiff must be treated separately, the court said:

“We do not agree . . . that all three plaintiffs should automatically be thrown into the same hopper for *Younger* purposes, and should thereby each be entitled to injunctive relief. We cannot accept that view, any more than we can accept petitioner’s equally Procrustean view that because [plaintiff] M & L would have been barred from injunctive relief had it been the sole plaintiff, [plaintiffs] Salem and Tim-Rob should likewise be barred not only from injunctive relief but declaratory relief as well. *While there plainly may be some circumstances in which the legally distinct parties are so closely related that they should all be subject to the *Younger* considerations which govern any one of them, this is not such a case*—while respondents [plaintiffs] are represented by common counsel, and have similar business activities and problems, they are apparently unrelated in terms of ownership, control and management. We thus think that each of the individual respondents should be placed in the position required by our cases as if that respondent stood alone.” *Id.* at pp. 928-9. (Explanation supplied). (Emphasis added).

It is apparent from this statement that the *Younger* considerations themselves are intertwined with the distinction between parties. The closer the relationship between parties, the more likely it is that the comity policies underlying *Younger* will be disrupted by federal equitable relief with respect to one when a pending criminal proceeding exists with respect to the other. In the present case, the nexus between Eagle Books and its plaintiff-employees is too substantial to allow for the categorical exclusion of consideration of comity allowed in *Steffel* and *Doran*, *supra*. Similarly, the differences in the interests of the corporate and the individual defendant are too substantial to utilize the same bad faith/extraordinary circumstances criteria as would apply if a pending criminal proceeding existed with respect to Eagle Books. Although no specific exception is arrived at, the court holds that under the circumstances of this case, declaratory and injunctive relief is appropriate on behalf of Eagle Books.

Eagle Books has interests in the enforcement and validity of Section 11-20 that do not equally pertain to its plaintiff-employees. First and foremost, Eagle Books operates bookstores at which, it has been conceded, communicative materials which are not obscene are kept and sold. The arrests, searches, and seizures all do great injury to the Eagle Books’ dissemination of these First Amendment materials. The bookstores must be closed down when arrests are made. Patrons are chilled from exercising their First Amendment rights by the presence of ongoing police procedures at the source of materials. And patrons of course have no access to these protected materials during the periods when the stores are closed. Moreover, the seizure of materials and cessation of protected activity give rise to a day to day pecuniary loss to Eagle

Books, much of which cannot be calculated. Also, Eagle Books is subject to prosecution under Section 11-20. See 38 Ill. Rev. Stats. §2-15. The decision not to so prosecute is presumably an exercise of that same prosecutorial discretion by which some employees might be arrested, but not others.

In contrast, the interest of the persons arrested is much more limited to the particular arrest. There is no allegation that they partake of their employer's loss of income. They have no institutional role as book and film dispensers. They do have an interest in being able to carry out their present employment, which appears to subject them to repeated risk of prosecution.

Perhaps the most important reason why these differences in interests do not, by themselves, justify separate treatment is what Eagle Books has *not* done, namely it has not refrained from activity which could give rise to prosecution under an arguably unconstitutional law for the purpose of testing it in federal court, as was the case of the plaintiffs who secured relief in *Steffel* and *Doran*. Eagle Books was the employer, and in a relevant sense the controller of its employees, who did violate that law. Eagle Books, therefore, has some vicarious involvement with the pending prosecutions, and it is therefore necessary to review the policies that support *Younger*.

Given the above conclusion, the court must now decide whether the circumstances of this case nonetheless justify, in terms of comity and federalism, equitable relief. Historically, federal courts have been unwilling to interfere with the state criminal system. In *Ex Parte Young*, 209 U.S. 123, 161-62 (1908), equitable relief was sanctioned against an attorney general who enforced a state criminal law (by seeking a writ of mandamus) which had been found

to carry so heavy a fine that citizens and corporations might be unwilling to challenge it for fear of being subject to the penalty for even one violation. In *Fenner v. Boykin*, 271 U.S. 240 (1926), the Supreme Court affirmed the denial of an injunction against the enforcement of a criminal statute:

"The accused should first set up and rely upon his defense in the state courts even though this involves a challenge to the validity of some statute, unless, it appears that this course would not afford adequate protection." *Id.* at p. 244.

The injunction of state prosecutions was reserved for situations in which the "danger of irreparable loss is both great and immediate." *Id.* at p. 243. These cases turn on whether or not the available state court proceeding afforded a reasonable way to challenge the allegedly unconstitutional statutes.

The boundaries of restraint of federal equitable relief against state prosecutions were further delineated in *Douglas v. City of Jeannette*, 319 U.S. 157 (1943), in which the Supreme Court affirmed the reversal of an injunction against prosecuting under a statute which the Supreme Court had declared unconstitutional. The rationale was that

"It does not appear from the record that petitioners have been threatened with any injury other than that incident to every criminal proceeding brought lawfully and in good faith, or that a *federal court of equity by withdrawing the determination of guilt from the state courts could rightly afford petitioners any protection which they could not secure by prompt trial and appeal pursued to this Court.*" *Id.* at p. 164 (Emphasis added). Accord., *Cameron v. Johnson*, 390 U.S. 611, 620 (1968).

The nexus between good faith prosecutions and lack of irreparable injury sufficient for intervention was articulated in *Dombrowski v. Pfister*, 380 U.S. 479 (1965). Prosecutions, arrests, searches and seizures had been allegedly undertaken, nominally pursuant to the Louisiana Subversive Activities and Communist Control Law, and the Communist Propaganda Control Law, with no expectation of valid convictions. Moreover, the items seized were allegedly used to harass those engaged in particular First Amendment activities. The Court held that the complaint stated a basis for equitable relief, even though there existed a pending prosecution against plaintiffs. The basis did not arise, however, from the prospect of mistake by the prosecutor.

"It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this court and that the mere possibility of erroneous initial application of constitutional standards will not usually amount to the irreparable injury necessary to justify a disruption of orderly state proceedings." *Id.* at pp. 484-485.

It can be seen from these cases that the bad faith exception is treated as a special class (and the only class the Supreme Court has recently viewed) of the cases in which the state proceeding is peculiarly inadequate to vindicate rights guaranteed by the federal constitution. Drawing from the facts in *Dombrowski v. Pfister*, there are a number of reasons why bad faith prosecutions are such appropriate occasions for an exception to the general rule against federal interference.

First of all, where there is no expectation of a valid conviction, proceeding through the state system, and even the Supreme Court, will not stop the launching of another

arrest or law suit. The pending proceeding only offers retrospective relief and is by definition unlikely to deter the unscrupulous law enforcement agent from future transgressions. Additionally, the consequences of the arrestee's entry into the state criminal justice system may be more honorable than usual, given the expectation of bad faith. Arrests may be attended with undue publicity, for example, as was the case in *Dombrowski*, thereby resulting in an undue impairment of the First Amendment rights of the plaintiffs. More generally, the incidents to a good faith criminal prosecution are enhanced because systematic safeguards against their unjustified initiation, such as the prerequisite of probable cause for an arrest, cannot be depended on. The entire social context of bad faith prosecutions must also be considered. A community, comprised mainly of those who are not the explicit victims of bad faith prosecutions, may change its behavior, particularly First Amendment exercise, because of the rash of arrests, even if those improperly motivated arrests are professionally executed, and even if no misuse of the fruits is involved. Finally, the extent of prosecutorial power is so great that its abuse³ may have serious effect before a state proceeding ends.

The bad faith exception is harmonious with the *Younger v. Harris* recitation of a "national policy forbidding federal courts to stay or enjoin state court proceedings except under special circumstances" 401 U.S. at p. 41 (footnote omitted), with

³ Where a statute itself is flagrantly unconstitutional the same presumption of irreparability may overcome the ordinary deference to state proceedings, even though there is no reason why the state proceedings might not quickly and competently address federal constitutional claims. *Younger v. Harris*, 401 U.S. 37, 53-5 (1971).

"... a sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States" *Id.* at p. 44,

and with a proper respect for state functions. However, matters which are quite capable of causing great and immediate irreparable harm are not always addressed in the pending state proceeding. Federal intervention in those instances cannot be characterized as a disregard for the competence of state court judges, or as a disregard for the overwhelming expectation that they will carry out their oaths to support the federal constitution. *See Huffman v. Pursue*, 420 U.S. 592, 611 (1975). Indeed, the bad faith exception is a recognition that where great and immediate irreparable harm will flow from continued prosecutions, and where the pending state court proceedings do not, by their nature, anticipate the injuries being done, federal courts must fulfill their role as the guarantors of the federal constitutional rights and must fashion appropriate relief. By definition, the injuries which inhere in a good faith prosecution are contemplated by the state court criminal proceeding. Also, where a different kind of state proceeding is involved, federal intervention might not be called for. *See Llewelyn v. Oakland County Prosecutor's Office*, 402 F.Supp. 1379, 1391 (E.D. Mich. 1975).

Given this context, we proceed to examine the facts before us to determine if the irreparability posed by the continued enforcement of Section 11-20 approaches that which has been associated with bad faith. In considering the following factors, it should be borne in mind that con-

ditions which, by themselves, may not be sufficient to give rise to irreparable harm justifying intervention, may nonetheless be relevant to the ultimate assessment of whether the total situation presented to the court is sufficient to determine the question before it in favor of granting equitable relief. First Amendment interests are at stake in this lawsuit. The prospect of continued enforcement seriously interferes with the distribution of communicative materials. It is uncontested that defendants intend to vigorously enforce the statute. While such vigor is in no way tantamount to bad faith, it does indicate that the ability to continue the First Amendment activity may be increasingly, immediately and unjustifiably threatened.

In the ordinary situation, this court would give very careful deference to the prospect that the constitutional issue could be raised before the state trial court. However, no real meaningful opportunity exists for such an issue to be raised there. As discussed earlier in this opinion, the Illinois Supreme Court has had four occasions in less than three years to review the very constitutional question raised by plaintiffs, the last occasion being on the same day that oral argument was held in this cause. Through those cases, that court has repeatedly indicated that it will not give any further specification of Section 11-20 through the judicial construction contemplated by *Miller v. California*, 411 U.S. 415 (1973). State trial courts are bound by their state Supreme Court, especially where the state Supreme Court has construed a ruling by the United States Supreme Court. Consequently, in light of the *People v. Ward*, *supra*, announcement that Section 11-20 is constitutionally specific, no Illinois trial court can be expected to give further consideration of the issue. Therefore, given the particular First Amendment aspects of this matter it is evident that

a federal court, by precluding some part of this matter from the state court's consideration, gives petitioner Eagle Books protection it could not secure through a prompt trial and ultimate appeal to the Supreme Court. *Cf. Douglas v. City of Jeannette, supra*, at p. 164.

What confronts plaintiff Eagle Books is not that its chances of success on appeal are "inauspicious", *Huffman v. Pursue, supra*, at p. 1211, or that there exists the "mere possibility of erroneous initial application of constitutional law", *Dombrowski v. Pfister, supra*, at p. 485, but rather that there is no meaningful opportunity at all to raise its issue, which we find more than substantial, before the state court system if it were to be prosecuted.

The attack on this statute is in essence facial, although it includes not only the words written by the legislature, but also those engrafted by the Illinois Supreme Court. Because the same statute, as construed, applies to all state citizens who may engage in the First Amendment activity carried out by Eagle Books and its counterparts, the federal interest is heightened. *Steffel v. Thompson*, 415 U.S. 452, 474 (1974). In addition we find the unconstitutionality of Section 11-20 invokes the prospect of the presumption of irreparability that would attend a flagrantly unconstitutional statute. While we do not find patent unconstitutionality to be encrusted on every part of the statute, it is noteworthy that, despite the directions of the remand of the original *Ridens* case, and despite the emphasis in *Miller* on specificity, the state has not explicitly confronted the specificity question either legislatively or judicially. The obviousness of the need for a specifying construction of Section 11-20 under *Miller* enhances the irreparability attendant to the lack of a meaningful opportunity to obtain proper construction through the state court system.

Aside from the factors of irreparability, the present case at the same time contains ingredients which soften the ordinarily harsh impact on state-federal relations that attends federal intervention. The state court system has carefully considered the constitutional question raised by plaintiffs, and we respect the process by which they have achieved their result. The intervention of this court does not cast in a negative light the competence or fairness of state court judges, rather, once the state court has reflectively performed that function, no purpose, under present circumstances, is served by delaying federal consideration of the same issue through a three step process of trial, appeal, and subsequent appeal (by leave) to the Illinois Supreme Court. Moreover, the nature of the relief granted today by the court does not directly encumber any ongoing prosecution. *Cf. Hicks v. Miranda*, 420 U.S. 920 (1975).

CONCLUSION

There is no present criminal proceeding against plaintiff Eagle Books. It is therefore, unnecessary to decide whether the present circumstances give rise to the same level of irreparability as is associated with a bad faith prosecution or "extraordinary" circumstances. We do find, however, that Eagle Books has shown, without contest, serious irreparable injury in the face of threatened enforcement of the statute which entails seizures of its materials and arrests of its employees. In view of the current state law, declaratory relief by itself would not seem to be adequate, *Cf. Ex Parte Young, supra*, since law enforcement persons have a duty to enforce Section 11-20. Accordingly, the court hereby declares that Section 11-20 is violative of the Fourteenth Amendment of the Constitution, and that defendants

are hereafter enjoined from enforcing Section 11-20 as presently construed, on the premises of the two bookstores owned by Eagle Books and from prosecuting Eagle Books for violation of Section 11-20. Particularly, future arrests and seizures of materials pursuant to the present Section 11-20 can no longer be authorized or carried out with respect to those premises.

Enter:

/s/ Walter J. Cummings
Judge
United States Court of Appeals

/s/ Hubert L. Will
Judge
United States District Court

/s/ Joel M. Flaum
Judge
United States District Court

Dated: May 28, 1976

NOTICE OF APPEAL

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

EAGLE BOOKS, INC., a Delaware corporation, GEORGE ROBERT HOBBS, JAMES E. TALKINGTON, JACQUELINE D. DAVIS, SHAWNEE ELMORE, ROBERT GOSNEY, MICHAEL MILAZZO, IRA JERRY FERRELL and DAVID J. FOSS,

Plaintiffs,

vs.

PHILIP REINHARD, Individually and in his capacity as State's Attorney of Winnebago County, Illinois, and DELBERT PETERSON, Individually and in his capacity as Chief of Police of the City of Rockford, Illinois,

Defendants.

No. 76 C 20014 — Three Judge Court

NOTICE OF APPEAL

(Filed July 12, 1976)

Notice is hereby given that Philip Reinhard, State's Attorney of Winnebago County, and Delbert Peterson, Chief of Police of the City of Rockford, appeal to the Supreme Court of the United States from a judgment dated May 28, 1976, entered herein declaring Ill. Rev. Stat. (1976), ch. 38, §11-20 to be violative of the Fourteenth Amendment

of the Constitution and enjoining the defendants from enforcing §11-20 as presently construed. Defendants take this appeal pursuant to 28 U.S.C. 1253.

Respectfully submitted,

WILLIAM J. SCOTT
Attorney General Of Illinois
188 W. Randolph Street
Suite 2200
Chicago, Illinois 60601
By: /s/ Melbourne A. Noel, Jr.
Assistant Attorney General

(Attorney for all defendants)
